K-225

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 961.

THE UNITED STATES, APPELLANTS,

vs.

GEORGE W. CHILSON.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 10, 1877.

Jan. 29 1877

Dismissed

SUPREME COURT OF THE UNITED STATES.

No. 961.

THE UNITED STATES, APPELLANTS,

vs.

GEORGE W. CHILSON.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

GEORGE W. CHILSON } No. 10621.
vs.
THE UNITED STATES. }

To the honorable Court of Claims:

The petition of George W. Chilson, an officer of the Army of the United States:

From the 3d day of March, A. D. 1869, to the 31 day of December, A. D. 1870, the petitioner was a first lieutenant of infantry in the Army of the United States. During a part of said period of time certain commutations of fuel and quarter' due to the petitioner from the United States were unlawfully withheld.

The petitioner being unable to obtain a sufficient examination of the papers of the War Department relating thereto, cannot set forth
2 with precision the amounts so withheld, and therefore prays the court to request the honorable Secretary of War to furnish a statement of the same.

The petitioner is a citizen of the United States, an officer of the Army of the United States, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against said Government. He demands judgment against the United States for such sum as shall be found due to him by reason of the premises.

H. E. PAINE,
Claimant's Attorney.

THE DISTRICT OF COLUMBIA, *ss:*

H. E. Paine, having been duly sworn, says that he is the attorney of the claimant named in the foregoing petition; that no assignment
3 or transfer of said claim, or any part thereof, or of any interest therein has been made, except as in said petition stated; that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

H. E. PAINE.

Sworn and subscribed before me, by H. E. Paine, this 26 day of June, A. D. 1875.

ARCHBD. HOPKINS,
Ch. Clerk Court of Claims.

Filed June 26, 1875.

4 In the Court of Claims.

GEORGE W. CHILSON } No. 10621.
vs.
THE UNITED STATES. }

Claimant's petition.

To the honorable Court of Claims:

The claimant was a first lieutenant of infantry in the Army of the United States from September 1, 1869, to April 30, 1870.

Upon the consolidation of the Army, under the law of March 3, 1869,

the claimant was, on the 16th day of August, 1869, ordered home to await orders; and thereupon left his post at Camp Reno, Arizona Territory, on the 1st day of September, 1869, and proceeded without delay to his home, at Detroit, Michigan, and remained awaiting orders
5 from September 1, 1869, until April 30, 1870, both days inclusive.

During said period of time the defendant furnished no quarters, and had no public quarters which could be furnished to the claimant at said city of Detroit, and the claimant was entitled, under section 37 of the act of July 28, 1866, and sections 1068, 1080, and 1081, of the Army Regulations, to commutations for 14½ cords of wood, at the rate of $10.00 per cord, amounting to $145.00, also to commutations for quarters for 8 months, at the rate of $18.00 per month, amounting to $144.00. He was also entitled to mileage, from his said post to his said home, for 2,656 miles, at 10 cents per mile, amounting to $265.60. No part of said
6 commutations of fuel and quarters or of said mileage has ever been paid. There is due to the claimant from the defendant, by reason of the premises, the sum of $554.60.

No action has been had by Congress or by any of the Executive Departments on this claim, of which the claimant is the sole owner; and no assignment or transfer of the same, or of any part thereof, or interest therein, has ever been made. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the said Government; and he is justly entitled to the amount of this claim, after allowing all
7 just credits and offsets.

The claimant demands judgment against the United States for the sum of $554.60.

BENJAMIN F. GRAFTON,
Claimant's Attorney.

THE DISTRICT OF COLUMBIA, *ss:*

Benjamin F. Grafton, having been duly sworn, says that he is one of the attorneys of the claimant named in the foregoing petition, and believes the facts as stated in said petition to be true.

BENJAMIN F. GRAFTON.

Sworn and subscribed before me, by Benjamin F. Grafton, this 24th day of January, 1876.

JOHN RANDOLPH,
Asst. Clk. Ct. of Claims.

Claimant's post-office address,
Post-office address of claimant's attorney, Washington, D. C.
Filed Jany. 24, 1876.

8 In the Court of Claims of the United States, December term, A. D. 1875.

GEO. W. CHILSON
vs.
THE UNITED STATES. } No. 10621.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not con-

fessing the same, or any part thereof, denies each and every the allegation' therein contained, and calls for strict proof of the same.

And, as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of five hundred and fifty-four dollars and sixty cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Jany. 28, 1876.

(Indorsed:) No. . *vs.* The United States. General traverse. , Assistant Attorney-General.

9 United States Court of Claims.

GEORGE W. CHILSON
vs.
THE UNITED STATES. } No. 10621. Suit brought June 26, 1875.

Claimant's amended petition.—Filed March 20, 1876.

To the honorable Court of Claims:

The claimant was a first lieutenant of infantry in the Army of the United States from September 1, 1869, to April 30, 1870. Upon the consolidation of the Army, under the law of March 3, 1869, the claimant was, on the 16th day of August, 1869, ordered home to await orders; and thereupon left his post at Camp Reno, Arizona Territory, on the 1st day of September, 1869, and proceeded without delay to his home at Detroit, Michigan, and remained awaiting orders from September 1, 1869, until April 30, 1870, both days inclusive.

During said period of time the defendant furnished no quarters, and had no public quarters which could be furnished to the claimant at said city of Detroit, and the claim' was entitled, under section 37 of the act of July 28, 1866, and sections 1068, 1080, and 1081 of the Army Regulations, to commutations for 14½ cords of wood, at the rate of $10 per cord, amounting to $145; also to commutations for quarters for 8 months, at the rate of $36 per month, amounting to $288. There is due to the claimant from the defendant, by reason of the premises, the sum of $433.

No action has been had by Congress or by any of the Executive Departments on this claim, of which the claimant is the sole owner;
10 and no assignment or transfer of the same, or of any part thereof, or interest therein, has ever been made. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the said Government; and he is justly entitled to the amount of his claim, after allowing all just credits and offsets.

The claimant demands judgment against the United States for the sum of $433.

BENJAMIN F. GRAFTON,
Claimant's Attorney.

THE DISTRICT OF COLUMBIA, *ss:*

Benjamin F. Grafton, having been duly sworn, says that he is one of the attorneys of the claimant named in the foregoing petition, and believes the facts as stated in said petition to be true.

BENJAMIN F. GRAFTON.

Sworn and subscribed before me, by Benjamin F. Grafton, this 24th day of January, 1876.

JOHN RANDOLPH,
Asst. Clk. Ct. of Claims.

Claimant's post-office address, Fort Wingate, New Mexico.
Post-office address of claimant's attorney, Washington, D. C.

11 In the Court of Claims.

GEORGE W. CHILSON
vs. } 10621.
THE UNITED STATES.

At a Court of Claims held at the Capitol, in the city of Washington, the 24th day of April, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said George W. Chilson, claimant, do have and recover of and from the United States the sum of three hundred and ninety-two dollars, ($392.)

By the court.

A true copy of record.

12 In the Court of Claims of the United States, Dec. term, 1875.

GEORGE W. CHILSON
vs. No. 10621.
THE UNITED STATES.

From the judgment rendered in the above-entitled cause on April 24, 1876, in favor of claimant, the defendants, by their Attorney-General, on the 11th day of July, 1876, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Asst. Attorney-General.

Filed July 12, 1876.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

13 Court of Claims.

GEORGE W. CHILSON
vs. } No. 10621.
THE UNITED STATES.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The claimant, being first lieutenant in the Twenty-first Regiment of

United States Infantry, on the 16th August, 1869, at his own request, was ordered home to await orders. On the 1st September, 1869, he accordingly left his post at Camp Reno, Arizona, and proceeded to his home in Detroit, Michigan. From the 30th September, 1869, to the 30th April, 1870, he reported as awaiting orders at Detroit. Subsequently he was assigned to duty on recruiting-service at Detroit.

II. The claimant did not apply for quarters or fuel to the quartermaster at Detroit. There were no quarters at that place during the above period subject to the control of the Quartermaster Department, which could have been assigned to him. The rate allowed by the War Department for commutation of officers' quarters was $18 a room per month. The rate allowed for commutation of fuel was, on the average, $10.25 a cord.

And upon the facts found in this case the Court of Claims decides the following

CONCLUSIONS OF LAW.

1. The claimant was entitled to commutation of fuel and quarters from the time of his reporting as awaiting orders after his arrival in Detroit until he was assigned to duty.

2. The commutation for quarters, which he should recover, is for that of two rooms, at $18 a room a month.

NOTT, J., delivered the opinion of the court:

The Supreme Court decided in Williamson's case (10 C. Cls. R., p. 50) that a military officer ordered to proceed to his home and there await orders is not "absent from duty with leave" within the meaning of the act 3d March, 1863, (12 Stat. L., p. 731,) though the order was issued at his own request; and, on the contrary, that an officer ordered to a particular place, there to "await orders," must remain at that place and continue as much under orders as though assigned to any ordinary military duty, and hence that he is entitled to full pay.

Notwithstanding the comprehensive terms of that decision, several questions are now presented by the Government in this, a kindred case.

The first objection raised is that it did not appear in the case before the Supreme Court that an officer thus ordered might designate his home in the first place, and change it at will afterward; in other words, that an officer ordered home to await orders might make his home ambulatory, and, by simply reporting from the places where he chanced to be, might, in fact, though not in form, be free to go where he
14 pleased and be constructively awaiting orders while traveling on business or pleasure. We are not satisfied that any such latitude of duty appears in this case; and, on the contrary, we are inclined to think that such conduct in an officer would be a discreditable evasion of duty, and a virtual disobedience of orders; and that a court should not sanction any such improper practice by holding it to be a thing which an officer has a legal right to do.

The second objection raised by the Government is that, by General Orders of the War Department, (No. 289, 1864,) "officers serving on courts-martial, courts of inquiry, military commissions or boards, will not be allowed commutation of fuel and quarters except by special orders of the War Department." But this order of the Department must be restricted to the duties to which it in terms refers, and those duties it is manifest are both specific and temporary in their nature. To extend the order to the extent now claimed would be to take this part of the com-

pensation of military officers entirely out of the hands of Congress and put it entirely within the control of the War Department. The act 28th July, 1866, (14 Stat. L., p. 332, § 37,) makes the Army Regulations a part of the law of the land, and by the regulations (1080, 1081) commutation was allowed to officers at stations without troops, or where serving without troops at posts where there are no public quarters which they can occupy; and the Supreme Court has decided that an officer thus awaiting orders was serving without troops.

The petition in this case seeks to recover commutation from the time that the officer left his post to proceed to his home, *i. e.*, for the period while he was on the way. We are of the opinion that the recovery must be limited to the time the officer was at the station, as indicated on his arrival by his reporting for orders.

The judgment of the court is that the claimant recover of the defendants, for commutation of quarters for seven months, $252, and for commutation of fuel for the same period, $140; amounting, in the aggregate, to $392.

15 In the Court of Claims.

GEO. W. CHILSOM *vs.* THE UNITED STATES. } No. 10621.

And now come the defendants, by their Attorney-General, and request the court to find the following facts:

1. It appeared from the evidence that officers ordered home to await orders, at their own request, were allowed to select such place as they chose for their home, and to change it from place to place at their pleasure.

Upon the foregoing request the court makes the following order, to wit:

Refused, as not sustained by the evidence.

16 2. No particular place was mentioned in the order as the home of claimant.

Upon the foregoing request the court makes the following order, to wit:

Allowed.

3. G. O. No. 289 was also in evidence, which is as follows:

[General Orders No. 289.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
Washington, November 28, 1864.

Officers serving on courts-martial, courts of inquiry, military commissions or boards, will not be allowed commutation of fuel and quarters, except by special orders of the War Department. All previous orders and regulations on the subject of these allowances are revoked.

By order of the Secretary of War.

E. D. TOWNSEND,
Assistant Adjutant-General.

17 THOMAS SIMONS,
Assistant Attorney-General.

Upon the foregoing request the court makes the following order, to wit

Allowed.

Filed April 12, 1876.

18 In the Court of Claims.

GEORGE W. CHILSON
vs.
THE UNITED STATES. } No. 10621.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon, of the application of the Attorney-General for the defendants for the allowance of an appeal, as filed in the clerk's office July 12, 1876, and of the order of the chief-justice of said court, allowing the same, of the findings of fact by the court and conclusions of law thereon, of the opinion of the court, and of the request of the defendants for additional findings of fact, and the rulings of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this ninth day of October, A. D. 1876.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 961. The United States, appellants, vs. George W. Chilson. Court of Claims. Filed 10th January, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES, APPELLANTS,
vs.
GEORGE W. CHILSON, APPELLEE.
} No. .....

APPEAL FROM COURT OF CLAIMS.

ARGUMENT FOR APPELLEE.

PAINE & GRAFTON,
Attorneys for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES, Appellants,
vs.
GEORGE W. CHILSON, Appellee.
No. ——

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR APPELLEE.

STATEMENT.

The decision of the Court of Claims presents a correct statement of the case, as follows:

"FINDINGS OF FACT.

"This case having been heard before the Court of Claims, the Court, upon the evidence, finds the facts to be as follows:

"I. The claimant, being first lieutenant in the Twenty-first Regiment of United States Infantry, on the 16th August, 1869, at his own request, was ordered home to await orders. On the 1st September, 1869, he, accordingly, left his post at Camp Reno, Arizona, and proceeded to his home in Detroit, Michigan. From the 30th September, 1869, to the 30th April, 1870, he reported as awaiting orders at Detroit. Subsequently he was assigned to duty on recruiting service at Detroit.

"II. The claimant did not apply for quarters or fuel to the quartermaster at Detroit. There were no quarters at that place during the above period, subject to the control of the Quartermaster's Department, which could have been assigned to him. The rate allowed by the War Department for commutation of officers' quarters, was $18 a room per month. The rate allowed of commutation of fuel was, on the average, $10.25 a cord.

"And upon the facts found in this case, the Court of Claims decides the following

"CONCLUSIONS OF LAW.

"1. The claimant was entitled to commutation of fuel and quarters from the time of his reporting as awaiting orders after his arrival in Detroit until he was assigned to duty.

"2. The commutation for quarters, which he should recover, is for that of two rooms, at $18 a room a month.

"The judgment of the court is that the claimant recover of the defendants, for commutation of quarters for seven months, $252, and for commutation of fuel for the same period, $140; amounting, in the aggregate, to $392."

From the judgment of the Court of Claims the United States appeal to this Court.

ARGUMENT.

I.

During the period covered by the appellee's demand, officers of the army were entitled by law to receive, at stations without troops, certain designated commutations of fuel and quarters, according to their rank; and the legal commutations of a first lieutenant of infantry stationed at Detroit, without troops, during that period, were for fuel two cords per month at $10.25 per cord, and for quarters two rooms at $18.00 per month for each room.

Neither the President, nor the Secretary of War, can, merely by virtue of powers conferred by the Constitution,

reduce the rate of compensation fixed by statute for officers of the army. Such reduction can only be made by virtue and in pursuance of statutory law.

By the Constitution the control of the army is divided between Congress and the President. It is provided in the second section of the eighth article that "the Congress shall have power to raise and support armies," and "to make rules for the government and regulation of the land and naval forces." It is also provided in the second section of the second article that "the President shall be commander-in-chief of the army and navy of the United States." The distinction between the powers conferred by these provisions upon Congress and the President respectively is the same which is preserved everywhere in the Constitution between the powers conferred upon the legislative and executive departments of the Government. It is the fundamental distinction between powers which are in their nature legislative and those which are in their nature executive. By these provisions all authority over the army which is in its nature legislative is vested in Congress, and all authority which is in its nature executive or administrative is granted to the President. While there may be cases lying near the boundary line between the two classes of powers, involving in their accurate practical classification no little difficulty, the regulation of the compensation of the army is not one of those cases. It falls as clearly within the scope of the authority conferred upon Congress as does the actual command of an army in battle within the scope of executive authority; and it falls as far from the line of separation in one direction as the command of troops on the field does in the opposite direction.

Whether, in the absence of any statutory provision fixing the rate of compensation of officers of the army, the President could, without authority of statute law, himself fix such compensation, is not a question in this case. If any such question were involved in the case, it would be impossible to demonstrate the existence of any such constitutional power.

But the question here is whether the War Department can, merely by virtue of powers vested in the President by the Constitution, and without statutory authority, reduce or withhold compensation actually fixed by statute law. Even if it would have been competent for the President or Secretary of War to fix the pay of the appellee, in the absence of legislation on the subject, it was not competent for them, or either of them, by virtue merely of powers conferred by the Constitution, without statutory authority, to reduce a rate of compensation actually fixed by law.

The provisions of law regulating commutations of fuel and quarters are the following: By the 37th section of the act of July 28, 1866, the Army Regulations of 1863 were made a part of the law of the United States, and as such were in force when the appellee's cause of action accrued. The following is the language of the act:

SEC. 37. *And be it further enacted*, That the Secretary of War be, and he is hereby, directed to have prepared, and to report to Congress, at its next session, a code of regulations for the government of the army and of the militia in actual service which shall embrace all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial. The existing regulations to remain in force until Congress shall have acted on said report.

SEC. 38. *And be it further enacted*, That all laws and parts of laws inconsistent with the provisions of this act be, and the same are hereby, repealed.

Approved July 28, 1866.

The new regulations, not having been reported to Congress by the Secretary of War, on the 15th of July, 1870, it was provided, in the act making appropriations for the army of that date, as follows, viz:

SEC. 20. *And be it further enacted*, That the Secretary of War shall prepare a system of general regulations for the

administration of the affairs of the army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority; and said regulations shall be reported to Congress at its next session; provided, that said regulations shall not be inconsistent with the laws of the United States.

Approved July 15, 1870.

The following are the provisions of sections 1068, 1069, 1074 and 1080, of the regulations of 1863:

"1068. The number of rooms and amount of fuel for officers and men are as follows:

	ROOMS.			CORDS OF WOOD PER MONTH.*	
	As quarters.	As kitchen.	As office.	From May 1 to Sept. 30.	From Oct. 1, to April 30.
* * *					
Lieutenant.....	1	1	—	½	2
* * *					

"1069. Merchantable hard wood is the standard; the cord is 128 cubic feet."

"1074. In November, December, January, and February, the fuel is increased one-fourth at stations from the 39th degree to the 43d degree north latitude; and one-third at stations north of the 43d degree."

"1080. When public quarters can not be furnished to officers, at stations without troops, or to enlisted men, at general or department headquarters, quarters will be commuted at a rate fixed by the Secretary of War, and fuel at the market price. When fuel and quarters are commuted to an officer, by reason of his employment on a civil work, the commutation shall be charged to the appropriation for the

* Or coal at the rate of 1,500 lbs. anthracite, or 30 bushels bituminous to the cord.

work. No commutation of rooms or fuel is allowed for offices or messes."

The quarters to be commuted under section 1080 of the army regulations include the kitchen. On page 160 an allowance is made to a lieutenant of one room as quarters and one as kitchen. On page 161, at the close of the table, one room is allowed for a regiment or post mess, which allowance is limited by section 1072 to cases where a majority of the officers of the regiment or post unite in the mess. By the last clause of section 1080, "no commutation of rooms or fuel is allowed for *offices* or *messes*." This leaves the kitchen commutable by law, as it always is in practice. The circumstance that the language in section 1080 is that "quarters will be commuted," etc., and not that "quarters and kitchen will be commuted," etc, is of course immaterial. Indeed, in the table on page 161 of the regulations, the mess-room happens to be inserted under the head of quarters. The meaning, however, is equally clear in both cases, and nicety of phraseology was not important.

The Court below found, as the proof showed, that the rate fixed by the War Department for commutations of quarters, as provided by section 1080 of the regulations, was at that time, for the city of Detroit, $18 per room; and that the average rate of commutation allowed for fuel, at the same time and place, was $10.25 per cord.

II.

The appellee, when his cause of action accrued, was not on leave of absence.

1. In the United States *v.* Williamson (see 10 Court of Claims, 50), the Supreme Court of the United States held as follows:

"The argument against the allowance of full pay is based upon the act of March 3, 1863, (12 Stat., 731,) which provides 'that any officer absent from duty with leave, except from sickness or wounds, shall, during his absence, receive

half of the pay and allowances prescribed by law, and no more.' Captain Williamson, it is said, was, during the period in question, absent from duty with leave, being neither sick nor wounded; and hence, it is said, can receive but half pay, however that absence might have been caused. This argument is unsound.

"The distinction between the case of an officer 'absent from duty with leave,' and that of an officer ordered to proceed to a particular place and there 'to await orders, reporting thence by letter to the Adjutant General of the army and to these headquarters,' is too plain to require much comment.

"While absent from duty 'with leave,' the officer is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him.

"The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place and to remain at that place. He cannot go elsewhere, he cannot return until ordered. He is as much under orders, and can no more question the duty of obedience than if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time.

"The authority to give leave of absence is committed by law to particular persons; the mode of making the application for leave is pointed out, and the maximum of its duration is prescribed.—(Army Reg. 1863, art. 21, adopted by the act of July 28, 1866.) A department commander can grant leave of absence for a period not exceeding sixty days. Application for leave exceeding four months must be referred to the War Department.

"The direction, on the other hand, to proceed to a particular place, there to await orders, how long to remain there, to attack, to retreat, or to do any other specified thing, belongs to the officer in charge.

"That the assignment was made at the request of the officer can make no difference. The pay is regulated by the position, and not by the manner or influence by which the position is acquired.

"Captain Williamson was ordered by the Adjutant General of the Department of Missouri, by authority of the General of the army, to proceed to his home and await orders, reporting thence by letter to the Adjutant General of the army, and to these headquarters.

"The power to make this assignment was a portion of the executive authority, and was vested in the commander of the army. Captain Williamson was not only justified in obeying this order, but it was his duty to obey it. It was his duty to proceed at once to his home, there to remain subject to orders to be communicated to him. He was expressly required by general order (No. 17) to make no application for special duty, but was informed that if his services were required a detail would be made without his application. He did proceed to his home and there remained waiting for orders until he was mustered out of the service. He was waiting orders, in pursuance of law, but was not absent from duty on leave.

" It is not in the power of the executive department, or any branch of it, to reduce the pay of an officer of the army. The regulation of the compensation of the officers of the army belongs to the legislative department of the government. Congress has fixed the pay of a captain of infantry at $165 per month. The deduction of one-half of the amount, when absent from duty on leave, is not applicable to the case of Captain Williamson. He is entitled to his full pay as a captain of infantry. The Court of Claims has done right, therefore, in giving its award in his favor for the amount withheld, and its judgment is affirmed."

The order in Williamson's case was in these words:

HEADQUARTERS DEPARTMENT OF THE MISSOURI,
FORT LEAVENWORTH, KANSAS, *June* 21, 1869.

SPECIAL ORDERS, }
No. 105. }

[Extract.]

5. By authority of the general of the army, Captain S. C. Williamson, 6th U. S. Infantry, is, at his request, relieved from duty in this department, and will proceed to his home and await orders, reporting thence by letter to the Adjutant-General of the army and to these headquarters.

* * * * * *

By command of Major General Schofield:

(Signed) CHAUNCEY MCKEEVER,
Assistant Adjutant-General.

The order in the case at bar was in substance the same as the foregoing, was issued under the same circumstances, and stands on precisely the same legal footing. Like the order in Williamson's case, it was issued upon the consolidation of the army, under the act of March 3, 1869, in pursuance of general orders numbers 16 and 17 of the War Department of that year; and the legal effect of the orders and the legal status of the officers in the two cases were precisely the same.

The ruling in Williamson's case, therefore, establishes the position that the appellee in the case at bar was not on leave of absence; and but for the intimation of a purpose on the part of the appellants to ask for a reconsideration of the doctrine of that ruling, we should present no argument on this point. To meet the possibility of a re-examination of the subject by the Court, we submit the following considerations.

2. By section 31 of the act of March 3, 1863, it was provided, that "Any officer absent from duty with leave, except for sickness or wounds, shall, during his absence, receive half of the pay and allowances prescribed by law, and no more; and any officer absent without leave shall, in addition to the penalties perscribed by law, or a court-martial, forfeit all pay or allowances during such absence." 2 Brightly, 28, 152.

The act entitled "An act making appropriations for the support of the army for the year ending June thirtieth,

eighteen hundred and seventy, and for other purposes," approved March 3, 1869, contained the following provisions:

SECTION 2. *And be it further enacted*, That there shall be no new commission, no promotions, and no enlistments in any infantry regiment, until the total number of infantry regiments is reduced to twenty-five; and the Secretary of War is hereby directed to consolidate the infantry regiments as rapidly as the requirements of the public service and the reduction of the number of officers will permit." (15 Stat. 318.)

One week after the passage of this act the Secretary of War issued the following order:

"WAR DEPARTMENT,
"WASHINGTON CITY, *March* 10, 1869.

"1. In compliance with section 2 of the act of Congress entitled 'An act making appropriations for the support of the army for the year ending June thirtieth, eighteen hundred and seventy, and for other purposes,' approved March 3, 1869, the infantry of the army will be consolidated into twenty-five regiments, as follows, viz:"

* * * * * *

"III. The senior company officers of each grade present for duty with any two regiments to be consolidated, and fit for active service, will be the officers of the consolidated regiment. The supernumerary officers will be ordered to their homes to await further orders. And supernumerary non-commissioned officers will be honorably discharged, unless they elect to remain in service in a lower grade."

* * * * * *

"V. All vacancies that may hereafter occur in the twenty-five infantry regiments will be filled by assignment of the senior officers of the same grade from the list of officers awaiting orders." * * * * *

"J. M. SCHOFIELD,
"*Secretary of War.*"

A few days later the following orders were issued by the General of the army:

"GENERAL ORDERS } HEADQUARTERS OF THE ARMY,
No. 17. } ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *March* 15, 1869.

"*Reorganization of the Infantry of the Army.*

"I. To accomplish the consolidation of the infantry regiments of the Army, as required by *general orders* No. 16, of the 10th instant, and at the same time make the transfers demanded by the necessities of the service as economically as possible, the President of the United States directs that movements and consolidations be made according to the following directions:"

* * * * * * * * *

"3. The company officers will be assigned, as directed in general orders No. 16, from the senior officers present and fit for active service, with any two regiments consolidated. But should any of the officers so assigned prefer to 'await orders,' the senior officers of the same grade desiring service with their regiments may be substituted for them. The officers in excess, including field officers not herein or otherwise assigned, will be ordered by the department commanders to their homes, and will report their address monthly, according to the regulations, as 'awaiting orders.'"

* * * * * * * * *

"II. No applications can be entertained from officers 'awaiting orders,' or on the 'retired list,' for special duty If their services are required they will be detailed without applying.

"III. The foregoing details will be carried into execution, under the department commanders without unnecessary delay. Reports will be duly made to the Adjutant General of the army as movements are accomplished; and regimental returns of the new regiments will be forwarded as soon as they are consolidated.

"By command of General Sherman:

"E. D. TOWNSEND,
"*Assistant Adjutant General.*"

The order which required the appellee to proceed to his home and await orders, and the "leave of absence," differ from each other in their essential qualities, at all stages, from their inception to their termination. They differ in respect of the power and duty of the superior officer to issue them, and the course of procedure prescribed for him by law, and also in respect of the preliminary steps required of the inferior officer who receives them. While they remain in operation, they differ as to the rights, privileges, and duties of the subordinate officer. And they differ in respect of the authority, means, and methods by which they are terminated.

The nature of the leave of absence is clearly defined and fixed by law. By the act of July 28, 1866, the army regulations, published in 1863, were made the law of the land. They were the law of the land during the whole period of time which intervened between the day when the appellee was ordered to proceed to his home to await orders, and the day when he was mustered out of the service of the United States. The characteristics of the leave of absence are fixed by article 21 (pp. 31, 32, 33) of the army regulations of 1863, in force as law in 1869, and 1870. The mode of application for leave of absence is clearly marked out. The authority to grant leaves of absence in certain cases is distinctly vested in particular officers. The maximum duration of a leave of absence is clearly prescribed. The requisites for extension are clearly laid down. An end as well as a beginning is made essential to the leave of absence. A department commander is forbidden to grant leave of absence exceeding sixty days. Applications for leave of absence exceeding four months are required to be referred to the Adjutant General for the decision of the Secretary of War. And even the War Department itself is prohibited from granting leaves of absence to officers on applications made out of the military channel.

The order requiring an officer to proceed home and await orders is nowhere specifically defined or authorized by the

regulations or by statute; nor is the status of an officer ordered to proceed to his home and await orders prescribed or defined, or his compensation expressly fixed, anywhere in the statute or in the regulations, except in section 1265, chapter 3, title XIV., of the Revised Statutes of the United States, approved June 22, 1874, after the appellee was mustered out of the army, which section relates to the army, and is in these words:

"SEC. 1265. Officers, when absent on account of sickness or wounds, or *lawfully absent from duty and waiting orders, shall receive full pay;* when absent with leave, for other causes, full pay during such absence, not exceeding in the aggregate thirty days in one year, and half pay during such absence exceeding thirty days in one year. When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable."

The right of the President and General of the army to order officers to proceed to their homes, to await orders, is, like the right to issue most other orders, incident to their general authority over the army. The General of the army has the same legal right to order an officer to proceed to a designated point and await further orders which he has to order him to proceed to a designated point and await the enemy, or to proceed to a designated point and await some uncertain future event. The derivation of the right is the same in each case. It is the duty of the officer to obey all lawful orders of his superior in command. On this ground, and on no other, rests his obligation to obey an order to proceed to his home and await orders. This duty is as obligatory as any other.

There is a fundamental difference of nature between a leave of absence and an order to proceed home to await orders, which of itself would exclude the construction of the War Department, placing the appellee in the position of an officer virtually absent on leave. The leave of absence, from its inception to the time when it expires by its own

limitation, rests upon permission, not compulsion. Until such expiration the control of the officer over the duration of his absence is altogether free and unrestrained. At the outset, having received his leave of absence, he goes from his post in the army, or, surrendering his leave of absence, remains at his post, as he sees fit; and having left his place, he remains absent until the expiration of his leave, or returns before its expiration, as he sees fit. But with the order to proceed home to await orders, all this is essentially different. When the order is issued, whether with or without his consent, the officer is compelled to proceed to his home. He has no discretion in the case. He is not permitted, but commanded, to go. So he is not permitted, but commanded, to remain absent. He is not permitted to return at his pleasure, but he is compelled to remain absent until ordered to return.

An order to proceed home to await orders may be lawfully issued with or without a previous consent or application of the officer so ordered. It is issued at the pleasure of the proper officer, by the same authority and in the same manner as other lawful orders are issued. But the leave of absence is issued on application only. In the nature of the case there can be no leave of absence without the consent of the officer concerned. The applications for leave of absence must reach the commanding officer through clearly defined military channels, and in clearly defined modes. But a request to be ordered home to await orders, if made at all, must take the course of requests for orders of any other kind. The power to grant leaves of absence, in certain cases, is specifically vested, by regulations having the force of law, in particular military officers and authorities. The power to issue an order commanding an officer to proceed to his home and await orders springs from the same grant in which originates the power to issue the great mass of orders to the army. The officer who is absent on leave rests under no compulsion, except to return at its expiration. His absence, up to the time of the expiration of his leave, is, as to its duration,

wholly voluntary and without restraint. He can return at any time before his leave expires. But the officer who is ordered home to await orders is not required or permitted to return at a *particular* time specified in the order. Nor is his absence subject to his own discretion; but it is compulsory, and subject to the control of the superior officer. A return from his home, without further orders, would be a violation of orders—a military offense, liable to punishment under military law. The leave of absence terminates either when it expires by its own limitation or when the officer chooses to surrender it and return to his place in the army. But the operation of the order to proceed home and await orders terminates when the superior officer chooses to issue further orders, and not before.

While the department commander is forbidden to grant leave of absence exceeding sixty days in duration, (Reg. 177,) he is subject to no such restriction when, by authority of the War Department, he orders an officer to proceed to his home and await orders. In the case before the Court, not only was the limit of sixty days wanting, but there was absolutely no limit at all prescribed by the department commander who issued the order, or by any other officer.

While it is provided, in the regulations, that applications for leave of absence for more than four months must be referred to the Adjutant General, for the decision of the Secretary of War, no such application for leave was so referred in this case. Nor was the election of the appellee to be ordered to his home to await orders (if it be claimed that such election was a virtual application for leave of absence for an indefinite period of time) so referred to the Adjutant General. Nor was there any decision of the Secretary of War on this election of the appellee. Nor can it be said that this requirement of the law, respecting leaves of absence, was dispensed with by the order of the General of the Army, (No. 17,) requiring the department commanders to order to their homes, to await orders, the officers who should elect to be so ordered. For,

in the first place, that order (No. 17) was issued in *advance* of the election of the appellee to be ordered home to await orders. It was issued March 15, 1869. But the election was made in August, 1869. And if the General of the Army could usurp the functions of the Secretary of War, and himself decide upon the application of the officer for leave in the Secretary's stead, he certainly could not so enlarge and extend these usurped functions as to decide upon the application before it was made. In the second place, the regulations confer upon the General of the army no power to usurp the functions of the Secretary of War, or to suspend the operation of the law in the premises—no power to dispense with the requirement that certain applications for leave shall be referred to the Adjutant General for the decision of the Secretary of War. And, in the third place, the Secretary of War himself could not in advance authorize a department commander to do that which the regulations, enacted by Congress into a part of the law of the land, expressly declare that the department commander shall not do. If, therefore, this order, commanding the appellee to proceed to his home and await orders, was a leave of absence, it was issued in violation of law, and was illegal. But if it was legal and valid, it was not a leave of absence.

If it be claimed that general order No. 17 was itself a leave of absence issued to the appellee, without or in advance of an application therefor, the answer is that the General of the army had no power to grant such leave of absence, either after, without, or in advance of an application. Only one officer in the United States besides the President could lawfully grant such leave for over sixty days, even upon application duly made; and that officer was the Secretary of War, who was himself forbidden to grant leave of absence, except upon application made through the proper military channel. (Reg. 1863, art. 21, sec. 178.)

By perverting an order to proceed home and await orders into a virtual leave of absence, it would be in the power of

the War Department arbitrarily and absolutely to change the status of the officer for an indefinite period of time, and virtually to nullify wise provisions of the law enacted for the security of the rights of the individual officer, as well as for the general stability and good order of the service. For example, in this case, if the appellee was absent on leave he had a right to return to duty, not only at the expiration of his leave, but whenever he chose to surrender his leave. But as a matter of fact, the appellee, under the order to proceed to his home and await orders, had no such power. He was expressly forbidden by the second subdivision of general order No. 17 even to ask permission to return to his place and duties. If the construction of the War Department is correct, he was to be visited with all the disabilities of a leave of absence, and at the same time robbed of all its rights and privileges. And he might be kept by the War Department in suspense for years between a leave of absence and an order to proceed home to await orders. If he should ask for commutations, the answer would be that he was on leave of absence, and therefore not entitled to commutations. If he should ask for work, *as the officer on leave of absence always may*, the answer would be that he was at home awaiting orders, under an order which prohibited him from even asking for work. If he should propose to surrender his virtual leave of absence, (*which the officer on leave of absence can always do,*) he would be told that he had no leave of absence to surrender, but was awaiting orders. If he should inquire when his "virtual leave of absence" would terminate, he would be told that he would learn something on the subject when the orders which he was awaiting should reach him, or when he should be mustered out of the service, in two, or ten, or twenty years, as the case might be.

The construction adopted by the War Department was *ex post facto* in its origin and character. The appellee had no notice that the third section of the first subdivision of general order No. 17 was to be a snare for him. The words of the section are—

"3. The company officers will be assigned, as directed in general orders No. 16, from the senior officers present and fit for active service, with any two regiments consolidated. But should any of the officers so assigned prefer to "await orders," the senior officers of the same grade desiring service with their regiments may be substituted for them. The officers in excess, including field officers not herein or otherwise assigned, will be ordered by the department commanders to their homes, and will report their address monthly, according to the regulations, as 'awaiting orders.'"

The appellee did not ask for a leave of absence. He would not have accepted, and could not have been compelled to accept, such leave. There was nothing in the text of this order, No. 17, or in the law or regulations, or in the previous usage of the War Department, to warn him that if he should, with his own consent, be ordered to proceed to his home to await orders, he might afterwards be treated as absent on leave. Of course nothing in the act of March 3, 1869, conferred upon the Secretary of War any new or special authority relating to officers on leave of absence or awaiting orders.

If an officer should be ordered, with his own consent, to proceed to a designated point and await either the enemy or an uncertain future event, it would be no more unjust to treat such officer as virtually on leave of absence, because he assented to the order, than it would be to treat the appellee as virtually on leave of absence in the present case, because he assented to be ordered to proceed to his home and await orders. It would, manifestly, be unjust so to ensnare officers into a position the consequences of which they could not foresee.

An objection to a recovery in this case was urged in the Court below in the following words:

"An officer waiting orders has just as much liberty of change as one on leave. This claimant has himself proved. (See printed pages 17, 19, 20, 31, 34, 43, 45, 47, 49, 54, 56, 61, 65, 67.) This shows clearly that officers awaiting orders

could go where they chose, only that they kept the Department advised of their address. Any number of places they chose to select, was their home for the time being. It is not at all clear that if these facts had appeared in the Williamson case but that the judgment would have been different, *even* for pay alone. When an officer is ordered ON DUTY to a '*station*,' he cannot control his own movements in this way. The Supreme Court say, 'The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different' (from an officer on leave.) 'It is his duty to go *to that place*, and to remain *at* that place,' and claimant's counsel relies upon this language to recover. The evidence in this case, *which did not appear in that*, shows this to be a mistake of fact. He could go *where* and *when* he chose, and was not ordered ' to a *particular place*,' within the meaning of that opinion. In many cases, the officer had *several homes* from which he reported, as claimant's evidence shows. Clearly, these cannot be 'stations' within the meaning of the law."

Perhaps the same objection will be made in this Court.

Now the question is not what the clerks or the assistant adjutant generals, or the adjutant general, or the Secretary of War, or the President himself, held to be the legal effect and consequences of the order to proceed home and await orders, but what its legal effect and consequences really were. The question is not whether these officials were of the opinion that the effect of the order was to place the officer concerned virtually on leave of absence, with absolute freedom of locomotion, but whether the order really did place him on such leave of absence. If the opinion of the authorities of the War Department as to the legal effect of the order and the legal status of the officer under it is conclusive upon this Court, then of course it is not material to know what the law of the case on this point is, but only to know what the officers of the War Department supposed it to be. And we admit that if this Court is not

to consider what the law is, but only what these officers held it to be, then the decision of the Court of Claims must be reversed. For the War Department certainly decided in December, 1869, that those officers who were, at their own request, ordered home to await orders, were virtually on leave of absence, after having held and acted on the opposite doctrine for a period of six months. And it is certainly true that an officer, on leave of absence, is free to travel where he will within the limits of the United States.

But in the first place the opinion of the War Department as to the legal effect of that order and the legal status of the officers concerned cannot be conclusive in this Court as to the law of this case. On the contrary, the opinion of this Court is to settle the law of the case. And the right of the Court to form such opinion is not foreclosed by the fact that the Adjutant General has held or expresssed theoretically or practically an opposite or different opinion on the subject. It is not less unreasonable for the appellants to say that because the Adjutant General held these officers to be on leave of absence, therefore this Court must so hold, than it would be for others to say that this Court must decide a case brought hither from the Circuit Court in favor of a plaintiff in error because the Circuit Court so decided, or for the appellee, in the case at bar, to insist that because this case was decided in his favor in the Court of Claims, it must be so decided here. On a question of law, the ruling of the Circuit Court or Court of Claims is not entitled to less consideration here than that of the Adjutant General or Secretary of War. If this court may reverse the former, it may also reverse the latter.

The true principle is laid down by Mr. Justice Story, in The United States *v.* Dickson, 15 Peters 161, in these words: "It has been also argued that the uniform construction given to the act of 1818, ever since its passage, by the Treasury Department, has been that the act has reference to the fiscal year. The construction so given by the Treasury Department

to any law affecting its arrangements and concerns is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. The construction given to the laws by any department of the executive government is necessarily *ex parte*, without the benefit of an opposing argument, in a suit when the very matter is in controversy; and when the construction is once given there is no opportunity to question or revise it by those who are most interested in it as officers deriving their salary and emoluments therefrom, for they cannot bring the case to the test of a judicial decision. It is only when they are sued by the government for some supposed default or balance, that they can assert their rights. Their acquiescence, therefore, is almost from a moral necessity, when there is no choice but obedience as a matter of policy or duty. But it is not to be forgotten that ours is a government of laws, and not of men; and that the judicial department has imposed upon it, by the constitution, the solemn duty to interpret the laws in the last resort; and however disagreeable that duty may be in cases where its judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it."

But the appellants seem to regard the question of the status of the officer ordered home to await orders as a question, not of law, but of fact. They used this language in the Court of Claims: "The Supreme Court say 'The obligations of an officer directed to proceed to a place specified there to await orders are quite different' (from an officer on leave). 'It is his duty to go to that place and remain at that place.' And claimant's counsel relies upon this language to recover. The evidence in this case, which did not appear in that, shows this to be a mistake of fact." They thus asserted, in substance, that this Court, in Williamson's case, in considering the legal effect of the order to proceed home and await orders, made a mistake of fact, and that the evidence in the present case shows that such a mistake was

made. This suggests a novel canon of interpretation. It is proposed that the legal effect of an order shall be determined by this court, not in the usual way, by a scrutiny of the order and the law, but by facts outside of the order and of the law, to be proven by the testimony of witnesses.

This implies that the views and acts of the War Department on this subject may constitute a practice which shall be valid as law. This is obviously erroneous. No opinions or acts of the War Department regulating the compensation of officers of the army can crystallize into law except by virtue of Congressional action. This Court held in Williamson's case that it was not in the power of the executive department of the government, or of any branch of it, to regulate the compensation of officers of the army; that its regulation belonged wholly to the legislative department of the government. The only mode in which the opinions and acts of the War Department can become a part of the law of the land is through regulations adopted with the approval of Congress. Such regulations were so adopted and approved, and became a part of the law. They are subjects of judicial construction like other laws. And this Court, in Williamson's case, held the effect of these legal regulations to be precisely the reverse of that which is attributed to the illegal opinions and practices of the War Department. The attempt to subvert that which is law by means of that which is not law is unwarranted, and should not succeed.

When we come, however, to ascertain precisely what the alleged facts are which so falsify the judgment of this Court in Williamson's case, we find them to be, first, that the Adjutant General, reversing an opinion on which he had acted for six months, decided that these officers were virtually on leave of absence; and, second, that as to payment and otherwise, the War Department subsequently treated them as on leave of absence. Of these two so-called facts, therefore, one is a theoretical, and the other is a practical, ruling by the War Department as to the legal effect of the order and the

legal status of the officer under it. So we are after all merely brought around again face to face with the bald proposition that the legal opinion of the Adjutant General or Secretary of War is conclusive authority for this Court.

But it is possible that the appellants rely upon another alleged *fact* as evidence to *prove* the *law* of this case. They may suppose that some of the officers ordered home to await orders were themselves of the opinion that they were virtually on leave of absence, and that their opinion, either of itself, or in conjunction with that of the War Department is of absolute authority in this Court in the determination of the legal status of the officers concerned, and possibly even of that of other officers. But in the first place it does not appear that a single one of the eighty four officers, who have commenced suits in the Court of Claims similar to the suit at bar, ever supposed himself to be virtually on leave of absence. On the contrary, it could be shown, if it were material or permissible, that all, or nearly all, complained of the decision of the War Department as wrongful and injurious, and that forty of them united in testing the validity of that decision in Williamson's case. In the next place it could be shown, if it were material and in order, that of these eighty-four officers only twenty-three ever reported from two different places, and only ten reported from more than two different places.

Now a bona fide change of home by an officer, while under such an order, could not, in the slightest degree, violate the spirit or letter of the order. For while the order to proceed to his home and await orders requires him to proceed to and remain at a designated place, that place is not, by the designation of a particular town or city, fixed at a specified geographical point, but it is designated as his home. Wherever he holds a home in good faith when the order is issued, there he must go. If his home subsequently ceases to be where it was at first, and is removed to some other place, he certainly cannot obey the order to remain at home by remaining at a place which is no longer his home.

Many, if not most young officers, have no home except that of their parents, to which they go when ordered home. Is there anything in the order to proceed home and await orders which can limit the right of the parents to change their place of residence at pleasure, or can arbitrarily separate the home of the son from that of the parents? Would not common sense, as well as the just policy of the law, revolt at an interpretation so absurd? A citizen of the United States, whether an officer of the army or not, has a right to change his home in good faith at his discretion. The place to which he removes, with intent to make it his home for the present or for an indefinite period, is his home, even though he may entertain an intention or expectation to remove elsewhere at some subsequent time.

Some of the army officers are unmarried men, without parents. When these are ordered to proceed to their homes and await orders, it may not be so easy to determine where their homes are, as in cases of officers who have houses and and families of their own, or make the homes of their parents theirs. It may also be more difficult to ascertain whether any subsequent change of home, by such officer, is a bona fide change or not. For the incidents and concomitants of such a change will be less marked, and the evidence of it less palpable, in the case of the latter officer than of the former. But that the latter is as clearly entitled as the former to have a home, and to change it in good faith, cannot be denied. The question will be, not as to his right to a home at a particular place when the order is issued, but as to the fact of his residence at that place. The question will be, not as to his right to make a bona fide change of home after the order is issued, but as to the fact of such bona fide change. A bona fide change of residence, by an officer ordered home to await orders, is strictly within the letter and spirit of the law.

But suppose that without changing his home the officer leaves it and travels to other places. What is the consequence? Simply this: If he does so without leave, he is

absent without leave; and while so absent, is of course not entitled to commutations. If he does so with leave, then, while so traveling, and until his return to his home, he is on leave of absence, and not entitled to commutations. But in either case his right to commutations revives when he returns to his actual home. In order, however, to fasten upon him the status and the consequences of a leave of absence, in such a case, it is not enough to show that the officials of the War Department would have been at any time willing to grant him leave of absence if he had asked it. It must be shown that leave of absence was actually granted, and also that it was asked for or accepted.

Of course it would not be enough to show that the War Department held that the order to proceed to his home and await orders, of itself, virtually placed him on leave of absence, and so entitled him to go whithersoever he saw fit. That would be a mere repetition of the attempt to constitute a department officer an authoritative expounder of the law for this court.

III.

The claimant was not "*absent from his appropriate duties, with or without leave,*" in the sense of the act of August 3, 1861, in which it is provided that "officers absent from their appropriate duties, for a period exceeding six months, either with or without leave, shall not receive the allowances authorized by the existing laws for servants, forage, transportation of baggage, fuel, and quarters, either in kind or in commutation."

In the nature of things, only one kind of leave is possible in the army; that is, leave of absence. A leave to choose between different kinds of military duty—to abandon one kind at pleasure, and assume another—is an impossibility. Such a device would be at once foreign and fatal to the very constitution of an army. The military authorization under which an officer exchanges one kind of military duty for

another is, in all cases, without exception, or possibility of exception, an order. Whether the order be issued with or without the application or consent of the subordinate, and whatever form it takes, it is still an order. And the officer is still on duty, and not on leave; is still under, and not exempt from orders. His action, however agreeable it may be to him, is not voluntary and unrestrained, but is enforced by the sanctions of military law, which binds him to the new duty precisely as it did to the old. He cannot be placed in a position where he may, at his discretion, abandon the new duty and return to the old duty, or undertake some other. He must remain where the order places him until assigned to some other duty by a new order.

A document emanating from a superior officer, and purporting to authorize an inferior officer to choose, at his pleasure or discretion, between different military duties, would be a curiosity. If valid, it would be utterly subversive of military discipline, order and authority. An army organized on any principle which would admit the possibility of such a status of the subordinate officer, would be a Bedlam instead of an army.

And absence with leave from an officer's appropriate duty, which shall amount to anything more or less than an absence on leave from all duty, is a military impossibility. If, to a colonel in command of his regiment, a "leave of absence from his regiment" should be granted, not coupled with an assignment to any other duty, it might, under certain circumstances, amount to an absolute leave of absence. If he should receive what purported to be a leave of absence from his regiment, coupled with an assignment to other duty, the document would merely amount to an order of assignment to a new duty. While the form of the order might indicate that it was issued at the request of the subordinate officer, that circumstance would in no way affect the essential character of the order, or the obligation of obedience on the part of the subordinate. But suppose (if a supposition so absurd is possi-

ble) that the document purports to be a leave of absence from his regiment, coupled with authority to engage, at his pleasure or discretion, in other military duties. In that case, so much of it as affects to clothe the subordinate with authority to engage, at his own pleasure or discretion, in other military duties, would be a nullity; and the residue, if not a nullity, would amount, at most, to an ordinary leave of absence.

There are only four methods known to the military law, or possible in the nature of the case, whereby an officer, once in command of his regiment or company, can become absent or separated therefrom, viz: 1. On the ordinary leave of absence; 2. Without leave; 3. Under an order issued at his own request; 4. Under an order not issued at his own request.

But it may be claimed that in the act of 1861, which provides that "officers absent from their appropriate duties for a period exceeding six months, with or without leave, shall not receive the allowances authorized by the existing laws for servants, forage, transportation of baggage, fuel and quarters, either in kind or in commutation," the words "appropriate duties" mean precisely what the words "appropriate commands" would have meant if used in their stead.

Now it is properly said that the *appropriate command* for a captain is a company; for a colonel, a regiment; for a brigadier general, two regiments. For this is expressly provided by article 1353 of the regulations of 1863, which is a part of the law of the land. But it cannot be said that the duty of a captain to command a company, or of a colonel to command a regiment, is of any stronger obligation than his duty to serve on a court-martial, in obedience to orders, or on a flag of truce, or a commission of surrender, or to await an enemy, in obedience to orders, at one point, or a future event at another, or an order of his superior officer at another. While these are the appropriate commands of these several officers, it is no more their appropriate duty to command these organizations than to do anything else which they may be ordered to do. Indeed, that military duty which is high-

est of all, in point of obligation, and is, therefore, above all others, the appropriate duty of the officer, is to obey the lawful order of his superior officer, whatever that order may require him to do. If the words "appropriate commands" had been placed where the words "appropriate duties" now stand, in the statute, then it might all have been different.

If the words "appropriate duties," in the act, should be held to mean the "appropriate commands" prescribed by regulation 1353, some very absurd consequences would follow. As was held by the Supreme Court in Williamson's case "the fact that the assignment was made at the request of the officer can make no difference. The pay is regulated by the position, and not by the manner or influence by which the position is acquired." And if this claimant can be treated as absent from his appropriate duty when ordered home to await orders, and can, for that reason, be deprived of commutations of fuel and quarters, so also can any officer who, with or without his own consent, is ordered home to await orders, or ordered to any duty other than the appropriate command prescribed in regulation 1353, be held to be absent from his appropriate command, and deprived of these commutations. Such a construction would, therefore, put it in the power of the superior officer, at his pleasure, to deprive the subordinate of commutations of fuel and quarters. Indeed, it would make the will of the superior absolutely and always decisive of the question whether the subordinate should, or should not, receive these commutations.

Under the Army Regulations of 1863, commutations of fuel and quarters are allowed only to officers *at stations without troops*. If it shall be held that officers separated or absent from their *appropriate commands* for more than six months, as, for example, Colonels separated from their regiments, are not entitled to commutations of fuel and quarters, then we shall have this singular state of the law, that a Colonel, while with his regiment, is debarred from these commutations, because he is serving with troops, and when away from his regiment is

deprived of them because he is not serving with troops. And this absurd practical result follows, that a Colonel, assigned to the most important military duty away from his regiment—to duty involving the heaviest personal expense—can only obtain the commutations which may be absolutely essential to his subsistence by making once in six months a journey of, say, 2,000 miles through the scattered posts of the Territories to visit his regiment, which visit, although not entitling him to any commutations while he is making it, is supposed to have some magic efficacy to make good his title to commutations while he is not making it—to secure to him the necessary commutations when, after traveling back and forth, at the expense of the Government, four thousand miles, he finds himself serving again, without troops, at the station from which he started.

But if it is held that he cannot have his commutations unless once in six months he meets his regiment all assembled together, then, when his regiment is scattered, in the customary way, at different posts, remote from each other, he cannot, by any possibility, perform circus-riding enough to entitle him to commutations. If they shall be essential to his subsistence, and if his service on the special duty shall be essential to the interests of the country, then it will only remain for the President to assemble all the scattered fragments of the regiment together, at no matter what cost, and to hold them together long enough for the colonel to exercise for a moment his so-called "appropriate command." An interpretation so puerile cannot be sound.

The appropriate command of the major-general is fixed at "four regiments or forty companies," and that of the brigadier-general at "two regiments or twenty companies," neither more nor less. But in nine cases out of ten, when a major-general or brigadier-general holds precisely or substantially one of these commands, he is serving in the field, in which case he is, by regulation 1084, expressly forbidden to receive any commutations of fuel or quarters at all.

Such a construction would therefore virtually abolish these commutations, so far as major-generals and brigadier-generals are concerned. If the President should ever happen in time of peace to place a major-general in command of four regiments or forty companies, or a brigadier-general in command of two regiments or twenty companies, and should subsequently transfer him to other duty, no matter how much more important it might be, the officer would, by his virtual promotion, actually lose his commutations of fuel and quarters after the expiration of six months. If, for example, he should be placed in command of a military department or division in which there should not happen, as in nine cases out of ten there would not happen, to be precisely the number of regiments and companies mentioned in regulation 1353, or on a most important court-martial, or on a board for the revision of the tactics or of the regulations, or for the trial of ordnance, the officer could receive no commutations; because, being absent from his "appropriate command" of the prescribed number of regiments and companies, he would be, in the sense of the statute, absent from his appropriate duty. The bare statement of the proposition would seem to carry its refutation. While the appropriate command of a major-general is four regiments or forty companies, and that of a brigadier-general is two regiments or twenty companies, the appropriate duty of these officers and their paramount duty is to obey the lawful orders of their superiors. The command of four regiments in time of peace is very far from being the highest duty to which a major-general may be lawfully assigned. And certainly there are more important duties for a brigadier-general than the command of two regiments or twenty companies.

Under regulation 1353, the appropriate command of a lieutenant-colonel is at least four companies, and that of a major at least two companies. And yet of thousands of lieutenant-colonels and majors, who have served in the army during the last fifteen years, very few, if any, were ever found actually exercising these so-called appropriate commands.

Such a construction of the act not only stamps as *inappropriate duty* a large part of the most important and difficult service performed in the army, but also stamps as illegal the action of the executive department in innumerable cases in which commutations of fuel and quarters have heretofore been paid.

What, then, did Congress mean by this statute? While it certainly cannot be true that the claimant is driven to the hard alternative of either showing that Congress had in fact some well-defined meaning, and what that meaning was, or submitting to whatever construction the defendant may choose to give to the act, it is not difficult to discover a reasonable meaning for the act or its real purpose. If we give to the words "absent from their appropriate duties with leave" the meaning of the words "on leave of absence," which is the only possible way in which officers can be "absent with leave" from anything, the act will have been, not futile, but effective and useful. Its effect, too, will be reasonable, and not absurd, as it would be if the words "appropriate duties" meant "appropriate commands," in the sense of regulation 1353. So construed, it will cut off the allowances for servant's pay, the allowances for servant's rations, and the allowance for servant's clothing, which were legal before the passage of this act. To these, as interdicted allowances, are added, it is true, forage, fuel, quarters, and transportation, which were not allowed by law to officers on leave of absence before this act was passed. But while the omission of these latter allowances would probably not have restored them, the mention of them certainly excludes the possibility of a restoration by implication, and can do no possible harm.

The decision of the Supreme Court in Williamson's case is an authority for the position that the claimant was not absent from his appropriate duty with leave. The Court used this language:

"He is as much under orders, and can no more question

the duty of obedience, than if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time." "That the assignment was made at the request of the officer can make no difference. The pay is regulated by the position, and not by the manner or influence by which the position is acquired."

While the question decided in Williamson's case was not in all respects precisely identical with the question presented in the case at bar, it was so closely analogous that the principle involved on the point now under consideration, is the same in both cases. In that case the Court held that "the claimant was not absent from duty with leave" in the sense of the act of March 3, 1863. Here, the question is, whether the claimant, under an order of the same tenor, was "absent from his appropriate duty with leave," in the sense of the act of August 3, 1861. But the ground on which the Court based the decision in that case makes it the law in this case. For the order to proceed home and await orders was the same in the two cases; and the Court held that under that order Williamson was not absent from duty with leave, because his absence was compulsory, and not voluntary; under orders, and not with leave. Even if a nice verbal criticism might, for any purpose, take a nominal distinction, where no real difference exists, between an "absence from duty with leave," and an "absence from appropriate duty with leave," there can be no pretense of a question that the voluntary element is absolutely essential and indispensable to both. And it is certain that a compulsory "absence with leave from appropriate duty," is not less a solecism than a compulsory "absence with leave" from duty.

IV.

While the appellee remained at his home at Detroit, in obedience to the orders which he had received, he was at a station without troops, in the sense of the law.

Wherever an officer is stationed by an order of his supe-

rior officer, there is his station. The question whether a place is a station, in the sense of the law, does not depend on the *number* of troops or officers stationed there. So far as that question is concerned it is quite immaterial whether an entire regiment, or only a single company, or a single officer, is embraced in the order. In either case the place is a station for those who are there stationed. The real test is this: If the officer is stationed there by the order of his superior, then it is his station, in the sense of the law. But if, being on leave of absence, he goes there, on his own motion, then it is not a station. In this particular case the question is whether the appellee went to his home and remained there on his own motion, being on leave of absence, or in obedience to the order of a superior officer. That the appellee went home and remained there, not of his own motion, on leave of absence, but in obedience to orders, has already been shown in this argument, and is incontestably established by the decision in Williamson's case, where this Court held that while, on the one hand, the officer absent from duty with leave is at liberty to go where he will, during his permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses, on the other hand the obligations of an officer ordered home to await orders are quite different; that it is his duty to go and remain there; that he cannot return until ordered to return; that he is as much under orders, and as strictly bound to obedience, as if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time; that Captain Williamson was not only justified in obeying the order to proceed to his home and await orders, but was in duty bound to obey it; that it was his duty to proceed to his home and there remain, subject to orders to be communicated to him; that he was expressly required by general orders (No. 17) to make no application for *special* duty, but was informed that if his services should be required a detail would be made without his application; that while he re-

mained at home under his orders he was awaiting orders in pursuance of law, and was not absent from duty on leave.

V.

In the Court below the appellants insisted that the appellee could not recover because he had not made a requisition upon the quarter-master at Detroit for quarters in kind. A scrutiny of the regulations will show that while a requisition for quarters and fuel in kind is a necessary step in the proceedings for obtaining an allowance of quarters and fuel *in kind*, such a requisition can have no possible bearing on the right to *commutations* of quarters and fuel; that neither the sense nor spirit of the regulations, nor their letter necessitates or warrants any connection of the requisition for fuel and quarters *in kind*, with the right to *commutations* for fuel and quarters *in money*.

Section 1080 relates to these commutations and is in the following words:

"When public quarters cannot be furnished to officers at *stations* without troops, quarters will be commuted at a rate fixed by the Secretary of War, and fuel at the market-price delivered."

There is no ambiguity or uncertainty in the meaning of this section. The condition on which the right to commutations of both fuel and quarters depends is the inability of the government to furnish public quarters at the station of the officer.

But section 1086 relates to a different subject, viz.: the allowance of fuel and quarters in kind, and is in these words:

"An officer arriving at a station *shall make requisition on the quartermaster for his quarters and fuel*, accompanied by a copy of the order putting him on duty at the station. If in command of troops, his requisition shall be for the whole, and designate the number of officers of each grade, of non-commissioned officers, soldiers, servants, and washerwomen."

This regulation does not prescribe a requisition for commu-

tations, but for fuel and quarters in kind; and the necessity, as well as propriety, of such a provision is obvious. But there would be no propriety in a provision for a requisition for fuel and quarters in kind in a case where the officer sought not fuel and quarters in kind, but only commutations therefor in money. For, in the first place, if the government cannot furnish public quarters, then not only is the right to commutations of fuel and quarters perfect, but a requisition for fuel and quarters in kind would be useless and puerile. And in the second place if the government is able to furnish public quarters in kind then a requisition presented by the officer and dishonored by the quartermaster cannot avail the officer as a ground of claim for commutations. For it is only when public quarters cannot be furnished in kind that commutations of fuel and quarters are allowed. The officer's remedy for a refusal by the quartermaster to respond to his requisition for fuel and quarters in kind, in a case where public quarters can be furnished, must be found, not in payment by the government, in the form of commutations, for the quartermaster's neglect of duty, but in the enforcement of a performance of duty on the part of the quartermaster.

This view, which would seem to be too clear to admit of the slightest doubt, is sustained by the rulings of the Court of Claims in Whittlesey *v.* The United States, 5 Court of Claims 103, and Long *v.* The United States, 8 Court of Claims 403, where it is held that such requisitions are unnecessary at places where public quarters cannot in fact be furnished.

VI.

The Attorney General refers to a decision by the Second Comptroller and the Quartermaster's Department, to the effect that officers awaiting orders are not entitled to commutation of quarters and fuel. It is in these words:

"To be entitled to quarters and fuel, or commutation therefor, an officer must be assigned to some *particular* duty at the place where he makes his requisition for them on some

quartermaster. In case an officer be ordered to some point to await orders (an order for *duty*) it has been held that he is not entitled to quarters and fuel."

Certainly the Second Comptroller has so decided; as he has also decided that officers awaiting orders were not entitled to full pay, but only to half pay. And he put the decision in each case on the same ground, to wit, that the officer, while awaiting orders, was not on duty, but on leave of absence. It is to overrule the decision of the Second Comptroller on the first point that the action in the case at bar was brought; just as the action in Williamson's case was brought to overrule the corresponding decision on the second point. The decision of the Supreme Court that the officer awaiting orders is not on leave, but is on duty, undermines and overthrows each of these decisions.

The Attorney General refers to a ruling made by the War Department in 1862, to the effect that an officer awaiting orders was not entitled to forage under the act of July 17, 1862, in which the following language was used:

"An officer waiting for orders cannot be properly regarded as '*on duty*' in the sense of this act. His status approaches more nearly that of an officer absent from duty by leave, until he receives orders."

We will not go out of our way to say that the decision itself in that case, under the peculiar statute which governed it, was wrong. But that the reason given for the decision was bad is clearly shown by the Supreme Court in Williamson's case. It is not important to know what the status of an officer *resembles*. It is necessary to know what it *is*. And, as we have elsewhere shown, the officer is of necessity in every case either on duty or on leave of absence from duty. One thing or the other his status must always be. If he is on leave of absence it matters little what resemblance his status bears to that of an officer on leave. On the other hand, if he is on duty it matters not how near his status approaches to that of an officer on leave. Unless, therefore, the

language in the forage case meant that the officer ordered to proceed home or elsewhere and await orders was on leave of absence, it was wholly without any meaning material to the question under consideration.

But the position that the officer awaiting orders is on leave of absence is the very position which was overruled by this Court in Williamson's case; and if there was no better ground for the decision in the forage case than that which is cited by the appellants, that decision is obviously in conflict with the doctrine of this Court.

VII.

To the last objection urged by the appellants we beg leave to reply in the words of the Court of Claims:

"The second objection raised by the Government is that, by *General Orders of the War Department*, (No. 289, 1864,) 'Officers serving on courts-martial, courts of inquiry, military commissions, or boards, will not be allowed commutation of fuel and quarters except by special orders of the War Department.' But this order of the Department must be restricted to the duties to which it in terms refers, and those duties it is manifest are both specific and temporary in their nature. To extend the order to the extent now claimed would be to take this part of the compensation of military officers entirely out of the hands of Congress, and put it entirely within the control of the War Department. The *Act 28th July*, 1866, (14 Stat. L., p. 332, § 37,) makes the Army Regulations a part of the law of the land, and by the regulations (1080, 1081) commutation was allowed to officers at stations without troops, or where serving without troops at posts where there are no public quarters which they can occupy; and the Supreme Court has decided that an officer thus awaiting orders was serving without troops."

PAINE & GRAFTON,
Attys. for Appellees.